creditors,[14] is essentially vicious. But where the *cestui que trust* is incapable of caring for himself the case seems otherwise. Tradesmen are ready to tempt the weak and improvident and to take advantage of extravagence and folly. If it is the policy of the law to subject every man's property to the payment of his just debts, it is equally its policy to protect those who cannot protect themselves. Thus inalienable equitable estates for the benefit of married women are upheld,[15] and the same policy is manifest in the limited contractual liability of infants. Yet the difference in the need of protection of a normal infant of eighteen and an older man who is wanting in ordinary sense and prudence, exists in law rather than in fact; and it is submitted that a difference in law unfounded in fact is not reasonable. It is not unnatural, however, that inasmuch as married women and infants have a well defined legal status, they have been accorded a protection denied to persons less easily discovered and classified. Nevertheless, as a spendthrift is incompetent in fact as regards money matters, it seems unfortunate that his want of status in law has caused spendthrift trusts to be treated like other inalienable equitable life estates wherever the question of their validity has arisen, without reference to what would seem the desirable test of validity, namely, the character of the *cestui que trust*.

The matter is now beyond judicial control in many jurisdictions. But in legislative regulations of similar matters are to be found interesting suggestions.[16] Thus in some States so much of the income of trust property as is not necessary to support in a suitable manner the beneficiary and his family, is liable for his debts.[17] But here no distinction is made between beneficiaries competent and incompetent in fact. Perhaps the most suggestive hint, though not applied to the particular question, is to be found in statutes providing for the appointment by a judge of a guardian for persons who so squander their estates as to expose themselves or their families to want.[18] If such a law, involving to all intents and purposes a judicial determination of status as a matter of fact, can be practically applied, equally practical would be a rule exempting from liability so much of a trust estate as is necessary for the proper support of the *cestui que trust* and his family, provided that he be such a person as is described in the statute above referred to.

EXTRATERRITORIAL EFFECT OF STATUTES RESTRICTING THE RIGHT OF MARRIAGE.—It must be conceded that a nation or state has the right to prescribe the formalities necessary for the creation of the status of marriage, which is a contract *sui generis*, not always governed by the rules applicable to other contracts,[1] and that it likewise may

[14]Tillinghast *v.* Bradford (1858) 5 R. I. 205; Gray, Restraints on Alienation, § 258; and see *id.*, preface to the second edition.

[15]Jackson *v.* Hobhouse (1817) 2 Mer. 483; see Stogdon *v.* Lee L. R. [1891] 1 Q. B. 661, 670; Lampert *v.* Haydel *supra*, 446.

[16]See 26 Am. & Eng. Encyc. Law 149, n. 5.

[17]Williams *v.* Thorn (1877) 70 N. Y. 270; Tolles *v.* Wood (1885) 99 N. Y. 616; and see Mills *v.* Husson (1893) 140 N. Y. 99, 105.

[18]See Maine Rev. Stat. (1903) c. 64, § 4, cl. 2.

[1]State *v.* Yoder (Minn. 1911) 130 N. W. 10; Westlake, Private Int. Law, (4th ed.) 54.

impose any restraint or prohibition upon the marriage of its subjects wherever contracted.[2] The general rule, indeed, is that the validity of a marriage is to be governed by the *lex loci celebrationis;*[3] but there are several well recognized exceptions, the most important for the present purpose being marriages involving polygamy and incest, and those expressly declared to be void by the local law from motives of fixed policy.[4] Further complications, however, are introduced by restrictive statutes, whose extraterritorial effect is the subject of much difference of opinion. Perhaps the commonest forms of such statutes are those forbidding the guilty party in a divorce suit to remarry either during the life of the innocent party,[5] during a specified time,[6] without the consent of the court,[7] or with the paramour.[8] While such provisions are generally regarded as in the nature of a penalty, and hence are held to have no extraterritorial effect,[9] nevertheless in some jurisdictions they are deemed to invest the guilty party with an incapacity of which he cannot divest himself.[10] Here is found a further encroachment on the so-called general rule, for the result is that the guilty party cannot remarry anywhere as long as he retains his original domicil.[11] On the other hand, a true question of status is presented by statutes prohibiting remarriage within the time in which an appeal may be taken. The existing marriage is not deemed to be totally dissolved until such time has elapsed, and, by the better view, a subsequent marriage wherever contracted is therefore not merely voidable but void.[12]

But the prohibitions of the merely restrictive statutes do not thus preserve the marriage status; the marriage is in fact dissolved and the parties single. Accordingly, if the legislature in enacting such a statute did not expressly exercise its undoubted power to declare the marriage absolutely void wherever contracted,[13] the question arises whether this marriage is so radically opposed to some

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[2]Story, Conflict of Laws, (8th ed.) 215; Steele *v.* Braddell (1839) Millw. 1, 22.

[3]Bishop, Marriage, Divorce and Separation, § 843.

[4]Story, Conflict of Laws, (8th ed.) 188.

[5]New York Consol. Laws, Dom. Rel. Law, § 8.

[6]La. Civ. Code (1875) § 137; Mo. Rev. Stat. (1879) § 2182; Ore. Laws (1872) § 499.

[7]Ga. Laws (1876), 1727; N. Y. Consol. Laws, Dom. Rel. Law, § 8; Md. R. C. (1878) art. 51, § 12; Mo. Rev. Stat. (1879) § 2182.

[8]Tenn. Mill. and V. Code, § 3332. For a general statutory summary see Stewart, Marriage and Divorce, § 200.

[9]Phillips *v.* Madrid (1891) 83 Me. 205; Van Voorhis *v.* Brintnall (1881) 86 N. Y. 18; and see Frame *v.* Thormann (1899) 102 Wis. 653, and cases cited.

[10]Williams *v.* Oates (N. C. 1845) 5 Ired. L. 535; State *v.* Kennedy (1877) 76 N. C. 251; Elliott *v.* Elliott (1873) 38 Md. 357.

[11]Story, Conflict of Laws, (8th ed.) 85; Williams *v.* Oates *supra;* State *v.* Kennedy *supra.*

[12]Estate of Wood (1902) 137 Cal. 129; Eaton *v.* Eaton (1902) 66 Neb. 676; McLennan *v.* McLennan (1897) 31 Ore. 480. *Cf.* Willey *v.* Willey (1900) 22 Wash. 115.

[13]Van Voorhis *v.* Brintnall *supra;* and see note 2 *supra;* Tyler *v.* Tyler (1898) 170 Mass. 150.

strong and fixed local policy embodied in the statute, that the courts will be justified in ignoring the *lex loci* and refusing to recognize its validity.[14] If this is found to be the case, neither the fact that the statute violated may be of a penal nature, nor the weight of the considerations calling for the complete application of the *lex loci* should, it is submitted, be sufficient to compel the courts of a State to violate its laws and fundamental policy by recognizing the validity of the foreign marriages of persons properly subject to its control by virtue of their local domicil.[15] *A fortiori* should such marriages, contracted with intent to evade the local laws, be denied the recognition sometimes accorded them,[16] and several jurisdictions have in fact adopted this view, even in criminal cases, without specific proof of such intent,[17] notably where instances of miscegenation come up before Southern courts.[18] Thus, for instance, it seems arguable on this principle that statutes forbidding a marriage in any form between persons too closely related, or without a certain consent, impress upon the party an incapacity which clings to him outside of his domicil.[19]

In the recent case of *Reid* v. *Reid* (N. Y. 1911) 72 Misc. 214, the converse of this doctrine was illustrated. The court had under consideration a statute declaring voidable any marriage, either party to which should be under eighteen years of age. The plaintiff, who was under eighteen and domiciled in New York, married in Washington the defendant, who was domiciled in Maryland. The marriage was valid by the laws of the District of Columbia and of Maryland, and the parties intended to reside in the latter State. A demurrer to the action for annulment was sustained, partly because of the matrimonial domicil,[20] but chiefly on the ground that the statute[21] failed clearly to express an intent to contravene the general rule as to the *lex loci*. Plainly, under the circumstances of this case the State has no interest which would justify its courts in overthrowing a marriage valid in another jurisdiction. In one view, indeed, it is difficult to conceive of the enactment of a statute dealing with a matter so vital to every man as marriage, without its embodying a public feeling and policy. Yet the dangerous nature of the power to invalidate marriages which is wielded by the courts should require as a prerequisite to its exercise the existence of a very strong and fundamental policy, in the nature of a rooted feeling in the community—something more than is indicated by the mere passage of such a statute.[22]

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[14]Unfortunately, however, the courts in many cases seem not to have given this consideration due weight, and to have concerned themselves primarily with technical rules of statutory construction.

[15]Brook *v.* Brook (1861) 9 H. L. Cas. 193; Kinney *v.* Comw. (Va. 1878) 30 Gratt. 858.

[16]See the Massachusetts statute prohibiting such evasion, passed as a result of the decision in Medway *v.* Needham (1819) 16 Mass. 157. Mass. General Statutes c. 106, § 6.

[17]Pennegar *v.* State (1889) 87 Tenn. 244, marriage with the *particeps criminis;* State *v.* Kennedy *supra.*

[18]Kinney *v.* Comw. (Va. 1878) *supra.*

[19]Westlake, Private International Law, (4th ed.) 61.

[20]*Cf.* Mitchell *v.* Mitchell (N. Y. 1909) 63 Misc. 580.

[21]New York Consol. Laws, Dom. Rel. Law, § 7. Such marriage is deemed void only from the time its nullity is declared by a court of competent jurisdiction.

[22]Pennegar *v.* State *supra.*

In the last analysis the matter does come down to a choice of two evils, and courts of different jurisdictions, even when applying the same general principles, may reach different results in the same class of cases, according as the fixed sentiment of the public may differ in matters of public policy or of political expediency.[23] Undoubtedly there is a presumption against the extraterritorial application of statutes in the absence of specific terms requiring it,[24] but it is obvious on the other hand that the paramount importance frequently accorded to the *lex loci* renders absolutely futile many pages of our statute books. Furthermore, in view of the above-mentioned right of a State to refuse to recognize the validity of specified classes of foreign marriages, of other recognized exceptions to the so-called general rule, and of the great practical difficulties in the way of a complete application of the *lex domicilii*,[25] it is impossible ever wholly to avoid the unpleasant possibility of a person being married in one jurisdiction and not in another.

RIGHTS OF THE OWNER OF LAND SUBJECT TO A PRESCRIPTIVE EASEMENT OF FLOWAGE OR DIVERSION OF WATERS.—Since an easement could only be conferred by grant[1] the common law presumption of an easement resulting from immemorial usage[2] was nothing more than an assumption that a grant had been made,[3] for upon no other hypothesis could the long submission of the servient tenant be explained.[4] But this presumption was not conclusive,[5] and where the acquiescence could be explained by showing either that a license had been given,[6] or that the enjoyment had not been adverse,[7] or that the servient owner was incapable of granting the easement claimed,[8] the prescription failed. It follows, therefore, that the nature of the acquiescence of the servient tenant, rather than the fact of enjoyment by the dominant tenant, is the controlling element.[9] A failure to keep this principle clearly in mind has often led courts to anomalous results in cases where the servient estate received a benefit from the easement. Thus, in the recent case of *Fin and Feather Club* v. *Thomas* (Tex. 1911) 138 S. W. 150, where the defendant by means of a dam had im-

[23]Pennegar *v.* State *supra.*

[24]1 Bishop, Marriage, Divorce and Separation, § 866.

[25]See *ibid.* § 848.

[1]Goddard, Law of Easements, (6th ed.) 198.

[2]Termes de la Ley, 487; 2 Bl. Com., (Lewis' ed.) § 264.

[3]Angus *v.* Dalton (1877) L. R. 3 Q. B. D. 85, 113.

[4]"It is the fact of his being thus exposed to an action and the neglect of the opposite party to bring suit, that is seized upon, as the ground for presuming a grant." Opinion in Felton *v.* Simpson (N. C. 1850) 11 Ired. L. 84; Hanson *v.* McCue (1871) 42 Cal. 303.

[5]Smith *v.* Miller (Mass. 1858) 11 Gray 145.

[6]Wiseman *v.* Lucksinger (1881) 84 N. Y. 31.

[7]"If they had no right to complain in the first instance we are not driven to the presumption of the grant of an easement to account for why they did not complain." Opinion in Hanson *v.* McCue *supra.*

[8]Barker *v.* Richardson (1821) 4 B. & A. 579.

[9]Ames, Disseisin of Chattels, 3 Harv. L. Rev. 318; 10 COLUMBIA LAW REVIEW 761.